

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

AMERICAN PHYSICIANS
ASSURANCE CORPORATION,

Plaintiff-Counter-Defendant,

v.

DONALD JAMES HAM, M.D.,
ALAMOGORDO EYE CLINIC, INC.,

Defendants-Counter-Plaintiffs,

and THE ESTATE OF MARTHA
VALENCIA CARDON, DECEASED, by
and through Personal Representative
ELIZABETH ALVAREZ,

Defendant.

No. 1:08-cv-638 PK/ACT

ORDER

THIS MATTER comes on for consideration of certain demonstrative exhibits. At the January 4, 2010, pretrial conference, the court requested copies in advance of the trial exhibits which have yet to be received. Doc. 272 at 20. The pleadings, however, contain the demonstrative exhibits and the court now decides that some of the demonstrative exhibits should be excluded in whole or in part.

At the pretrial conference, the court indicated that counsel could refer to demonstrative exhibits to the extent that they were predicated on items not in dispute and

the underlying basis for the demonstrative exhibits was admissible without objection.

Doc. 272 at 20-21. The court indicated that demonstrative exhibits could be exchanged the day before trial and objections taken up the first day of trial. Doc. 272 at 22-23.

The court has reviewed the demonstrative exhibits prepared prior to certain substantive rulings at the pretrial conference. Docs. 247 and 257. Certain exhibits or portions thereof appear to conflict with the court's rulings concerning the role of the Patient's Compensation Fund (PCF) in the underlying lawsuit. See Docs. 226; 272 at 5-6; 335 at 3-5. Specifically, some items appear to be focused on the role of the PCF or its representatives and should be omitted. Other items are problematic for other reasons noted.

Pleading	Item	Ruling
Doc. 257-2; Ex. 1	APA's Timeline	
	Entries: 01/17/2008	omit "and E. Lutz stated she brought no money at all"
	01/21/2008	omit
	02/28/2008	omit
	03/07/2008	omit
	04/15/2008	omit
	04/16/2008	omit
	04/17/2008	omit
	04/22/2008	omit both entries
	04/23/2008	omit second entry
	04/24/2008	omit

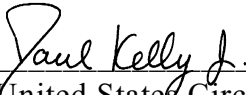
Pleading	Item	Ruling
Doc. 257-2; Ex. 1	04/28/2008	omit
	04/29/2008	omit both entries
	05/02/2008	omit both entries
	05/2-3/2008	omit
	05/03/2008	omit
	05/07/2008	omit second and fourth entries
	05/08/2008	omit “cc: to E. Lutz”
	05/08/2008	omit second entry
	05/10/2008	omit
	05/15/2008	court will reserve on this entry
	05/23/2008	omit first, second and fourth entries
	06/18/2008	omit
	06/25/2008	omit
	07/01/2008	omit “Lutz and PCF still have not agreed to contribute any money to settle case”
	09/05/2008	omit
Doc. 257-2, Ex. 2	APA’s calculation of the exhaustion of policy limits	exclude as inconsistent with the court’s ruling that APA’s tender was insufficient, Doc. 272 at 14-15.

Pleading	Item	Ruling
Doc. 257-2, Ex. 3	Typed version of Erla Lutz's handwritten notes	exclude
Doc. 257-2, Ex. 4	Settlement agreement memorandum of understanding between Cardon, Ham and the PCF	exclude
Doc. 257-2, Ex. 5	§ IV(A), (B) & (D) of the policy and the exclusion of punitive damages	exclude at this time (see below)
Doc. 247, Ex. D	§ IV(A), (B) & (D) of the policy	exclude at this time (see below)
Doc. 247, Ex. E	APA Marketing Statement: "We've Got Your Back"	court will reserve on this exhibit

Although both parties have listed policy provisions as demonstrative exhibits, the court will exclude these provisions at this time without further explanation of how they are directly relevant to claims the jury (as opposed to the court) must pass on.

IT IS SO ORDERED.

DATED this 14th day of May 2010, at Santa Fe, New Mexico.


 United States Circuit Judge
 Sitting by Designation